Supreme Court, U.S.
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No. 85-1129

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL E. JOHNSON,

Petitioner

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* MID-ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS*

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation hereby moves this Court for leave to file the attached brief as *amicus curiae*. Consent was secured from counsel for all active parties. Copies of the letters of consent have been filed with this Court.

Mid-Atlantic Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of Pennsylvania. It is a public interest law firm which participates in litigation involving matters of broad public interest such as the instant case which is likely to impact in one form or another a substantial portion of the nation's employers and employees.

STATEMENT OF THE CASE

For the sake of brevity *amicus* does not separately set forth its statement of the case but adopts that set forth by the petitioner.

ARGUMENT

I. Key Facts

Respondent, Transportation Agency, Santa Clara County, California (the "Agency") discriminated against petitioner, a male, on the basis of his sex, in favor of a female.

The Agency had never discriminated against females. (Cert. App. 13a, Finding of Fact 22).[1]

The only discrimination of which the Agency was guilty, therefore, was its refusal to promote petitioner in favor of a less qualified female. (Cert. App. 11a-13a, Findings of Fact 9-16, 21). But for her sex, the less qualified female would not have been promoted to Road Dispatcher. (Cert. App. 13a, Finding of Fact 20).

In reversing the District Court, the Court of Appeals did not undertake to disagree with the foregoing facts. Rather, it ignored those facts in favor of the following rationale:

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1. References to the Appendix to the petition for *certiorari* are referred to as "Cert. App. _____".

References to the Joint Appendix on the merits are referred to as "JA. _____".

> "Plans like this one are usually voluntarily adopted by employers who wish to express and act upon their commitment to social justice."

[*Johnson v. Transportation Agency, Santa Clara County, California*, 770 F2d., at 757.]

II. Unanimity

Amicus suggests that this case presents both the opportunity and necessity of a unanimous opinion of reversal.

In the view of *amicus*, such an opinion will result if prior opinions are given a straight line extrapolation.

More importantly, a unanimous opinion will be highly desirable as a matter of judicial definition, as may be seen by a brief consideration of the opinions of the courts below. Both of those eminent courts have been distracted by fine point debate from attention to the fundamental viewpoints on which the Justices of this Court appear to agree. Chief among them is the point of view that an acceptable affirmative action program, involving at least race classifications, must be predicated upon identifiable evidence of past discrimination which the plan is designed to remedy.[2,3]

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2. The only possible exception to this conclusion appears to be the single opinion of Justice Stevens dissenting in *Wygant* v. *Jackson Board of Education* in a factual pattern involving racial violence in an educational setting, a pattern far from that presented here. (*See*, ____U.S. ____, ____, 54 U.S.L.W. 4479, 4492 (1986). But see Justice Stevens' statements at 10, *infra*.

3. "[T]he perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share." [*University of California Regents* v. *Bakke*, 438 U.S. 265, 303 (1978)]. In any consideration of exceptions to the proscriptions of Title VII, the remedial action permitted, if any be permitted, must bear a direct relationship to the severity of the discriminatory wrong to be remedied. Temptation to sanction action

(Footnote continued)

When the District Court found that the agency had never discriminated on the basis of sex and the Court had before it only a plan which attributed underrepresentation to an historic lack of interest by females in the jobs involved, its inquiry should have ended. [4]

Similarly, it is quite clear that the Court of Appeals incorrectly read *Weber* as an open door to the exercise by any employer of its view of social justice, the plain language of Title VII and the true underpinnings of *Weber* be damned.[5]

III. The Relevant Precedents

A. This Court's inquiry will unquestionably begin with the plain language of Section 703 [42 U.S.C. Sec. 2000e-2], which proscribes discrimination based on race or sex, *inter alia*. This Court has acknowledged that the proscription is of discrimination against both non-whites and whites with respect to race and both males and females with respect to sex. [*McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)].

A significant minority of this Court has held to the view that this should end the inquiry. [*Steelworkers* v. *Weber*, 443 U.S. 193, 228 (1979) (Rehnquist, J., dissenting), 443 U.S. 193, 218 (Burger, C.J., dissenting)].

Particularly when presented with a record in which the only allegation of discrimination is of that practiced against the petitioner, the literal language of Section 703 should be deemed to apply without further debate. Section 703 prohibits discrimination, discrimination occurred, no countervailing discrimination appears and in

(Footnote continued)
designed to remedy centuries of invidious and odious race discrimination should be tamed where non-race based classifications are involved. And, of course, in this case there was no past discrimination to remedy. (Cert. App. 13a, Finding of Fact 22).

4. The "plan" discussed herein is the Agency's Affirmative Action Plan set forth at JA. 29-109.

5. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

fact was held not to have occurred. In the view of *amicus* no further search beyond the confines of 703 should be deemed either necessary or justified.

B. This Court has declared that under certain circumstances an employer may employ race-based classifications as part of an affirmative action plan. [*Steelworkers* v. *Weber*, 443 U.S. 193 (1979)].[6]

It has not yet defined in detail the boundaries of such permissible plans. [Id., 443 U.S., at 208].[7]

A second minority of this Court has clearly stated in *Weber*, and subsequent cases involving affirmative action by agreement and court order, that to be acceptable, affirmative action based on race-based classifications, must be predicated upon convincing evidence of past discrimination which the affirmative action is designed to remedy. [*Weber*, 443 U.S., at 213 (1979) (Blackmun, J., concurring); No. 93, *International Assocation of Firefighters, AFL-CIO* v. *The City of Cleveland*, ___ U.S. ___, ___, 54 U.S.L.W. 5005, 5013 (1986) (White, J., dissenting); *Wygant* v. *Jackson Board of Education*, ___ U.S. ___, ___, 54 U.S.L.W. 4479, 4481 (1986) (Powell, J., for the Court); 54 U.S.L.W., at 4484-85 (O'Connor, J. concurring)].[8]

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6. *Amicus* respectfully questions the judicial logic of permitting an employer-citizen greater leeway than that provided to the courts by Congress, under a statute of proscription against employer discrimination.

7. Given the sort of result presented by the case at bar where direct, one-on-one discrimination would be allowed by a Court of Appeals because it perceives that affirmative action plans are adopted for the benefit of social justice, *amicus* suggests that this Court should clarify the holding of *Weber*. Please also see text, *infra* at 13-14.

8. *Amicus* recognizes that the case presents a Title VII claim, but urges that under the facts of the case and the philosophies cited, the distinction between such a claim and an equal protection claim is one without a difference. Whether the requisite evidentiary standard of "convincing" evidence be applied in Title VII statutory cases, or some lesser standard, in no event do the decisions of this Court

(Footnote continued)

Indeed, for affirmative action using race-based classifications to be acceptable, a state employer must be found to be truly remedying its own past discrimination, if not a specific act of discrimination. [*Wygant*, 54 U.S.L.W., at 4485 (O'Connor, J., concurring), *Firefighters*, 54 U.S.L.W., at 5013 (White, J., dissenting)].

The majority of the Court in *Wygant* expressly reaffirmed its rejection of the notion that mere societal discrimination would justify affirmative action by use of race-based classifications. As Justice Powell stated for the Court:

> "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."

(*Wygant*, 54 U.S.L.W., at 4481 (plur. op.); *see also*, *Bakke*, 438 U.S., at 311-315 (1979).

In *Weber*, the permitted employer activity was grounded in a long-standing intentional exclusion of blacks from crafts and craft training programs, an odious practice denounced in so many judicial decisions as to make such exclusion a proper subject of judicial notice. (*Weber*, 443 U.S., at 198 n. 1).

In *Firefighters*, this Court was presented with action taken after long and repeated litigation against the City of Cleveland resulting in judicial findings of wide patterns and practices of race discrimination against its potential civil servants. [*Firefighters*, ____ U.S. ____, ____, 54 U.S. L.W. 5005, 5006 (1986)].

(Footnote continued)
remotely suggest that the necessary predicate may be found in the negative finding that no past discrimination had occurred. (*See also*, *Firefighters*, 54 U.S.L.W., at 5013) (White, J., dissenting).

This Court was presented in *Wygant* with no more than statistical disparities, styled societal discrimination, and a desire on the part of the employer to establish educational "role models."[9] A majority of this Court rejected the planned action, reaffirming the necessity that the action must be based on convincing evidence that it was designed to remedy past discrimination. Even there, however, the rejected action was grounded in "racial tension" to the point of violence. [*Wygant*, 54 U.S.L.W., at 4480 (plur. op.); 54 U.S.L.W., at 4488 (Marshall, J., dissenting)].

By comparison, the instant case does not present the issue of race discrimination but sex discrimination; it does not present any evidence of past sex discrimination, let alone convincing evidence, but presents findings of fact that the employer never engaged in sex discrimination; it does not present any evidence of compelling or any like level of state interest in remedying past discrimination because there was none.

All that is presented is a public agency's viewpoint of societal justice which would allow first, the frustration of a man's career in favor of the de-humanizing concept that its workforce must ape anonymous statistics, and second, the frustration of Congress' view of social justice as reflected in Title VII and its legislative history.

C. A third minority of this Court appears more disposed toward voluntary affirmative actions. As will be seen, however, these Justices retain their commitment

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9. Although some Justices of this Court have apparently taken the position that it is not a necessary predicate for a valid affirmative action plan that specific prior discrimination have been shown, no Justice has taken the position that mere statistical imbalances are sufficient. The Ninth Circuit majority was wrong when it held that "a mere statistical disparity suffices to show that a job category was 'traditionally segregated'." (*Johnson v. Transportation Agency, Santa Clara County, California*, 770 F 2d., at 764, n. 1).

to fundamental principles at direct odds with approval of respondent's plan here and with the Court of Appeals' approach.

The major premise of Justice Brennan's opinion in *Weber* was that "because blacks had long been excluded from craft unions, few were able to present experience credentials required of the employer there." (443 U.S., at 198). Justice Brennan read the totality of Title VII to encourage the elimination of "an unfortunate and ignominious page in our country's history." [443 U.S., at 204, citing *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 418 (1975)].

The signifance with respect to this case, of Justice Brennan's premises in *Weber*, was recently highlighted by his explanation of certain legislative history of Title VII, *viz.*:

> ". . . it is clear that the bill's supporters only wished to emphasize that an employer would not violate the statute merely by having a racially imbalanced work force, and, consequently, that a court could not order an employer to adopt racial preferences merely to correct such an imbalance."

[*Local 28, Sheet Metal Workers International Association* v. *E.E.O.C.*, ____ U.S. ____, ____, 54 U.S.L.W. 4984, 4992 (1986)].

Similarly, in his dissent in *Wygant*, Justice Marshall, in urging the propriety of the Jackson school system's collectively-bargained layoff plan, was clear in the premises of his argument and in articulation of principles which he thought were held inviolate by the action presented in that case:

> "We need not rely on any general awareness of 'societal discrimination ' . . . [t]he imperative to integrate these public schools was urgent. Racially motivated violence had erupted at the

schools, interfering with all educational objectives."

* * *

"Article XII modified contractual expectations that do not themselves carry any connotation of merit or achievement; it does not interfere with the 'cherished American ethic' of '[f]airness in individual competition,' *Bakke, supra,* at 319, n. 53, depriving individuals of an opportunity that they could be said to deserve."[10]

* * *

"Article XII was forged in the crucible of clashing interests. All of the economic powers of the predominently white teachers' union were brought to bear against those of the elected board, and the processes yielded consensus."

* * *

"The concerns that have prompted some Members of this Court to call for narrowly tailored, perhaps court-ordered, means of achieving racial balance spring from a legitimate fear that racial distinctions will again be used as a means to persecute individuals, while couched in benign phraseology. That fear has given rise to mistrust of those who profess to take remedial action, and concern that any such action 'work the least harm possible to other innocent persons competing for the benefit'."

(____ U.S. ____, ____, 54 U. S. L. W. 4479, 4490-91).

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10. Notwithstanding the action taken against petitioner, the instant plan itself contemplates the necessity of promoting the best qualified individual. (*See, e.g.*, plan provisions at JA. 76-77 and 109.)

In like fashion, Justice Stevens has spoken eloquently of the proper focus on individual equality and the counter productive nature of reverse discrimination.

> "Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality without regard to race or religion [or sex], was one on which there could be a 'meeting of the minds' among all . . . and a common national purpose."

[*University of California Regents* v. *Bakke*, 438 U.S. 265, 416 n. 19 (1978) (Justice Stevens dissenting) (insertion supplied)].

> "[T]he basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes."

[*Los Angeles Dept. of Water & Power*, 435 U.S. 702, 709 (1978)].

> "The ultimate goal must be to eliminate entirely from government decision-making such irrelevant factors as a human being's race [or sex]. The removal of barriers to access to political and economic processes serves that goal. But the creation of new barriers can only frustrate true progress. For as Mr. Justice Powell and Mr. Justice Douglas have perceptively observed, such protective barriers reinforce habitual ways of thinking in terms of classes rather than individuals."

[*Fullilove* v. *Klutznick*, 448 U.S. 448, 547 (1980) (Justice Stevens dissenting) (insertion supplied)].

It will readily be seen that the Justices forming this third minority hold fast to the protection of fundamental principles.

Equally readily will it be seen that the discriminatory action permitted by the court below violates the premises, principles and safeguards which this minority has articulated.

This case does not present a factual pattern of intentional racial exclusion as in *Weber,* or of gender exclusion. This case is not grounded in racial tension and resultant violence. The plan presented in this case, far from the product of the "crucible of clashing interests," is the unilateral product of a single employer's view of social justice. The only remotely relevant information appearing upon the record are statistics of gender imbalance, that very condition which, standing alone as it does here, Justice Brennan has pointed out Congress decided would not constitute discrimination. (*Sheet Metal Workers,* 54 U.S.L.W., at 4992).

What the record does present is action taken pursuant to the plan which collides head-on with, and destroys, the opportunity which the petitioner merited because he had achieved it and which he deserved. It did so by an act of prohibited sex discrimination.[11]

IV. The Plan Is Not Temporary

The instant plan and the discrimination worked against petitioner find no basis in the consistent decisions and opinions of this Court, as shown above. But assuming, *arguendo,* that some action were to be sanctioned despite that law, under, for example, the tests set forth in *Weber,* the Agency's plan fails. One such test is whether a plan is temporary. As the District Court found, "the Affirmative Action Plan had no end date or other

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11. To promote someone less qualified over someone more qualified, is itself an act of discrimination. When the reason for such promotion is grounded in gender, the sin of discrimination is compounded.

provision which would have the effect of ending preferential treatment to women." (Cert. App. 13a, Finding of Fact 24).

The plan in this case seeks not only to attain certain hiring goals, but effectively seeks to maintain those goals into an undefined future. The plan speaks often of the need for "continuing action" with respect to establishing and maintaining the percentages of women and minorities in the Agency's workforce.

Moreover, according to the plan, it will moderate or amend the goals of hiring to comport with changes in the Census data.[12] Thus the plan contemplates continuing changes in its goals to accommodate changes in the demographics of the County work force.

Moreover, as hiring is a continuing process, the plan will operate as a permanent requirement to ensure that the work force during any given time period qualifies with respect to the percentage goals for different groups set by the plan. Even when those goals are achieved, they will need to be continually applied so that the percentages remain constant. The plan is "timeless" in its scope and therefore should not be upheld by this Court. As Justice Powell stated in *Wygant:*

> "But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a Court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." (54 U.S.L.W., at 4482).

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12. The plan established percentage long-range goals for women and minorities based on the ratio of those groups in the area work force, according to the 1970 Census. The plan further provided, however, that these goals would be modified "in accordance with the data derived from the 1980 Census or other official data that may become available." (JA. 54)

V. Unrealistic Nature of the Plan

This Court should examine the plan closely. It is a document laced with unrealistic premises and demands, styled "goals", particularly with respect to the jobs that were involved and for which it sought to establish a goal of 36.4 percent for women. Many of the jobs admittedly involved "heavy labor." Indeed, certain of the job categories which had to be filled by this goal of 36.4 percent for women, were significantly underrepresented by women because, as the Agency acknowledged in its plan, "few women seek entry into these positions." (JA. 56). For example, women were "greatly underrepresented in the bus maintenance function." (JA. 50). That is, women were not applying and historically had not applied to be bus mechanics. This is not surprising. The lack of women in the heavy labor job categories, such as mechanics and body and fender repairers, was not the result of any discrimination, but rather represents the normal and natural desires and inclinations of women with respect to the types of work they seek.[13] Nevertheless, the instant plan seeks unrealistically to mechanically impose the same representation for each and every kind of job.

VI. Public Policy

Amicus further suggests that this Court consider seizing the opportunity presented by this case to reformulate the *Weber* rule as a matter of sound public and judicial policy.

The plan presented in this case is so devoid of potential justification that this Court should examine the signals which *Weber* sent to the courts below. Neither

13. It might be asked whether the Washington Redskins or Dallas Cowboys are guilty of discrimination because they do not employ any women on their teams. Should the National Football League be required to hire women to accord with the percentage of women in the work force, and if the League did not, would it be guilty of discrimination? Of course not.

court in the instant case focused on the principle that affirmative action can only be justified to remedy past discrimination whether that of the specific employer or, *arguendo,* some broader employer discrimination. At a minimum a clearer definition of the bounds of an acceptable plan should be announced so that other careers which may include, as petitioner's did here, voluntary demotions for the sake of experience, are not destroyed or substantially disrupted in the process of accomplishing a "good result." [*cf. Weber,* 443 U.S., at 219 (Burger, C.J., dissenting)].

Amicus suggests more. Affirmative action which results in the provision of equal opportunity does not necessarily have to involve reverse discrimination.

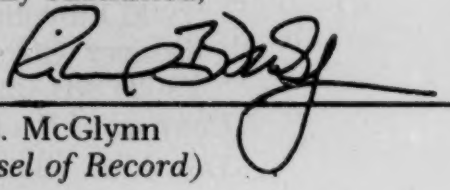
Amicus believes that it perceives a middle ground that may be exemplified by a different solution which might have been applied by the employer in *Weber. Amicus* would not argue with an employer plan under the *Weber* facts which simply would have removed the experience requirement for admission to craft jobs, coupled with the establishment of a non-race based training program from which the most qualified candidates, black or white, would be selected. The plan might well be coupled with announcements to the surrounding public at large of the availability of the program. In such a situation admission to the program on a statistical basis would injure no one, provided selection or admission to the craft job was based on merit.

Amicus would urge that a formulation such as that it has suggested above, or a like formulation propounded by the nine wiser heads on this Court, would be a proper accommodation between historical underrepresentation in a case which contained evidence of past discrimination, and Title VII's clear prohibition against discrimination as between whites and non-whites or men and women or as between members of any other protected class.

CONCLUSION

For the foregoing reasons *amicus* urges this Court to reverse the decision of the Court of Appeals for the Ninth Circuit, with instructions to enter a judgment awarding petitioner the relief payed for by him.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Richard B. McGlynn, Counsel of Record for *Amicus curiae* Mid-Atlantic Legal Foundation, Inc., certify that on the 21st day of August, 1986, I caused to be served three (3) copies of the attached Motion and Brief on the following:

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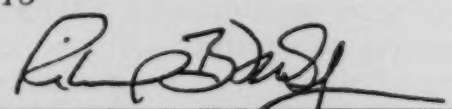

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